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No. 99-138

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE VISITATION OF NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, MINORS, JENIFER AND GARY TROXEL

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Does the award of a visitation order solely on the dispositional standard of the best interest of the child without requiring a threshold finding of unfitness violate a parent's right to procedural due process?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities iv

Interest of the *Amicus* 1

Summary of Argument 2

Argument 6

I. The History of the "Best Interests of the Child" Standard Demonstrates that it is a Dispositional Standard Used By Courts of Equity to Supervise Wards of the Court 6

II. The Decisions of This Court Have Identified and Embraced The View that the "Best Interests of the Child" Standard Cannot Be Imposed on Parents Absent a showing of failure 10

Conclusion 13

TABLE OF AUTHORITIES

Cases

Biggs v. Harris,
64 N.C. 413 (1870) 9

Board of Directors of Rotary International v. Rotary Club of Duarte,
481 U.S. 537 (1987) 4

Bowers v. Hardwick,
478 U.S. 186 (1986) 6

Caban v. Mohammed,
441 U.S. 380 (1979) 10

Carey v. Population Services International,
431 U.S. 678 (1977) 4

City of Akron v. Akron Center for Reproductive Health Inc.,
462 U.S. 416 (1983) 4

Cowls v. Cowls,
8 Ill. 435 (1846) 8

Demot v. Commonwealth of Pennsylvania,
64 Pa. 302 (1870) 9

Employment Division of Oregon v. Smith,
494 U.S. 872 (1990) 4

Farrington v. Tokushige,
273 U.S. 284 (1927) 4

Griswold v. Connecticut,
381 U.S. 479 (1965).....4

H.L. v. Matheson,
450 U.S. 398 (1991).....4

Hewitt v. Long,
76 Ill. 399 (1875).....9

Hodgson v. Minnesota,
497 U.S. 417 (1990).....4

In re custody of Smith,
137 Wash. 2d 1, 13, 969 P.2d 21 (1998).....3

In re visitation of Troxel,
87 WN.App. 131, 940 P.2d 698 (Div. 1, 1997).....2

Lawson v. Scott,
9 Tenn. 92 (1825).....7

Lehr v. Robertson,
463 U.S. 248 (1983).....4

Maher v. Roe,
432 U.S. 464 (1977).....4

Meyer v. Nebraska,
262 U.S. 390 (1923).....3

Michael H. v. Gerald,
491 U.S. 110 (1989).....4

Parham v. J.R.,
42 U.S. 584 (1979).....4, 12

Paris Adult Theater v. Slaton,
413 U.S. 49 (1973).....4

Pierce v. Society of Sisters,
268 U.S. 510 (1925).....3

Prince v. Massachusetts,
321 U.S. 158 (1944).....3

Quilloin v. Walcott,
434 U.S. 246 (1978).....11

Reno v. Flores,
507 U.S. 292 (1993).....11

Santosky v. Kramer,
455 U.S. 745 (1982).....11, 12

Smith v. Organization of Foster Families,
431 U.S. 816 (1977).....12

Stanley v. Illinois,
405 U.S. 645 (1972).....3

Steele v. Thacher,
22 F.Cas. 1204, 1 Ware 85 (D.Me. 1825).....7,8

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986).....4

Vernonia School District v. Acton,
515 U.S. 646 (1995).....4

Wardell v. Wardell,
91 Mass. 518 (1865).....9

Wisconsin v. Yoder,
406 U.S. 205 (1972).....3

Statutes

RCW 26.10.030(1).....2

RCW 26.10.160(3).....2

Constitutional Provisions

U.S. Const. Amend. XIV 6, 9, 10, 13

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights, including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential-

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

not because they are ancient and deserve veneration, but because they were the elected representatives of the people. Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people when they proposed and ratified the Constitution. Those promises are what is ultimately at stake in this case.

SUMMARY OF ARGUMENT

A Washington State statute provides that "any person may petition the court for visitation rights at any time." . The court may order such visitation if it is determined to be in the "best interests of the child." RCW 26.10.160(3).

The legislature had created strict standing requirements when third parties sought custody of children.[2] Pursuant to this section, petitions for third party custody require a showing of parental unfitness or that the child is not in the custody of one of the parents. The Washington Court of Appeals ruled that this same rule of standing had to be superimposed over the plain language of the visitation statute.[3] The court held that this judicial construction—amounting to an amendment—"is consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children."[4] After so

[2] RCW 26.10.030(1)

[3] *In re visitation of Troxel*, 87 Wash. App. 131, 940 P.2d 698 (1997)

[4] *Id.* at 87 Wash.App. at 135, 940 P.2d at 800.

construing the statute, the Court of Appeals held that the grandparents of the children lacked standing to seek visitation because there was no allegation of parental unfitness or lack of parental custody.

The Supreme Court of Washington reversed the Court of Appeals on the issue of standing. The higher court held that the legislation should be interpreted according to its plain language.[5] Grandparents met the requirement of being "any person" and thus, their standing to file the visitation petition was clear.

However, the state supreme court found the visitation statute an unconstitutional interference with parental rights. Armed with the precedents of this Court which repeatedly hold that the right of parents to direct the upbringing and education of their children is a fundamental right,[6] the court employed the compelling

[5] *In re custody of Smith*, 137 Wash. 2d 1, 11-12, 969 P.2d 21 (1998).

[6] See, e.g. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("The Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) ("the liberty of parents and guardians to direct the upbringing and education of children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children . . . . This primary role of the parents in the upbringing of their children is now established beyond debate"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("freedom of personal choice in matters of family

interest test to find the statute unconstitutional. The core fault of the statute, the court held, was the failure of the visitation statute to require a predicate proof of harm to the child before involving the jurisdiction of the court.

The grandparents successfully petitioned this Court for certiorari arguing that the state supreme court had applied the wrong level of scrutiny to a case of parental rights.

Your amicus is fully dedicated to the preservation of parental rights as deserving the highest level of constitutional protection. Nonetheless, a dedication to the original intent of the Constitution troubles us concerning the use of the theory of "substantive due process" as the textual source for this right.

This Court should, in our opinion, soon undertake a thorough review of the whole doctrine of unenumerated

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life is a fundamental liberty interest protected by the 14th Amendment"); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) ("We have long held that there exists a 'private realm of family life which the state cannot enter'"). See also; *Farrington v. Tokushige*, 273 U.S. 284, 298, (1927), *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), *Paris Adult Theater v. Slaton*, 413 U.S. 49, 65 (1973), *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977), *Maher v. Roe*, 432 U.S. 464, 476-479 (1977), *Parham v. J.R.*, 442 U.S. 584, 602-606 (1979), *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 461 (1983), *Lehr v. Robertson*, 463 U.S. 248, 257-258 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), *Michael H. v. Gerald*, 491 U.S. 110, 112 (1989), *Employment Division of Oregon v. Smith*, 494 U.S. 872, 881 (1990), *H.L. v. Matheson*, 450 U.S. 398, 410 (1991), *Vernonia School District v. Acton*, 515 U.S. 646, 654 (1995).

rights to ascertain an historically correct theory for their recognition. Such a review would necessarily involve more topics than parental rights. The whole field of "reproductive rights" would headline the list of issues, which would be affected by such a review. Your amicus would hope that the result of such review would be that those rights grounded in the history of this Republic at the time of the adoption of the relevant constitutional provisions would survive, and those rights not so grounded would be abandoned. Parental rights, we suggest, would thrive under this standard.

However interesting these issues may be, this is not the right case for resolving these difficult questions. We respectfully suggest that the proper resolution of this case is found in the time-honored principles of *procedural* due process. This approach fully protects both the rights of the parents and the original intent of the Constitution.

The state law is unconstitutional because it allows a dispositional standard ("the best interest of the child") to be employed without the necessity of a predicate factual finding that the parents had failed or forfeited their parental duties. The Due Process Clause requires this predicate finding before invading the parental liberty just as surely as it requires a finding of delinquency before a juvenile court may make dispositional orders "in the best interests of the child." These are procedural rights of parents which cannot be constitutionally ignored.

The Due Process Clause prohibits court removal of one's property without a predicate finding that a claimant is entitled to the possession of the goods. Due process prohibits criminal sentencing unless there has been a prior determination of guilt. Due process requires finding of parental unfitness prior to the loss of custody of one's

child. So too, due process requires a finding of parental fault as a predicate to the invocation of a court's jurisdiction to assign visitation rights to some third party.

This procedural right of parents was fixed in history at the time of the adoption of the 14th Amendment. Accordingly, this understanding of the Due Process Clause is fully consistent with the original intent of the Constitution.

ARGUMENT

I.

THE HISTORY OF THE "BEST INTERESTS OF THE CHILD" STANDARD DEMONSTRATES THAT IT IS A DISPOSITIONAL STANDARD USED BY COURTS OF EQUITY TO SUPERVISE WARDS OF THE COURT

A review of the case law which predates the adoption of the 14th Amendment demonstrates that it was universally understood that a child had to be made a ward of the court before a court was empowered to employ its discretionary power to make orders it believed to be in the best interests of the child.[7]

[7] The legislative history of state sodomy laws contemporaneous to the adoption of the Bill of Rights and the 14th Amendment was viewed as an appropriate method for determining the intent of the Framers of that Amendment relative to a substantive due process claim in *Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986). Since the "best interests of the child" is essentially a judicial standard, we review the contemporaneous case law to determine the historical support for the procedural due process principles we advance in this case.

One of the earliest cases was *Lawson v. Scott*, 9 Tenn. 92 (1825). In this case, Scott had fathered an illegitimate child born to a woman who had later married a Mr. Lawson. Without notice to Mrs. Lawson, he obtained a court decree establishing his paternity. Lawson subsequently filed a petition to obtain custody of his daughter who was about four years old. The trial court granted him custody on the basis of a state statue that the father was automatically entitled to the custody of his child absent a showing of unfitness. The Supreme Court of Tennessee, reversed, and held that the mother's common law right to the custody of a child born out of wedlock could not be ignored.

Importantly, the court used an analogy from another Tennessee statute that allowed courts to appoint guardians for children whose fathers had died. Such guardians would then be allowed to sign a contract binding the child to an apprenticeship. This statute ignored the rights of the mother—leaving her out of the process. The court held that it was insufficient to find that the child was an orphan (vis-à-vis the father) and without personal estate because such a law overlooked the ability of the mother to care for the child from her own estate. Before a court could appoint such a guardian and make the child a ward of the court; "[a]nother fact must appear, to give the county court jurisdiction over the child. It must be a pauper." Only after proof of the inability of the mother to care for the minor could the jurisdiction of the court be invoked to act for the child's best interests.

In a federal case from the same year, the district court of Maine recognized that parents have the right to the custody of their children which cannot be overridden without a showing that the parents have "waived or renounced" their rights. *Steele v. Thacher*, 22 F.Cas. 1204,

1 Ware 85 (D.Me. 1825). The court specifically addressed the issue of third party claims to the custody of children. "A stranger who violently or clandestinely withdraws the child from the parent's authority, and appropriates to himself the fruits of the child's industry, does a wrong to the parent for which the law will give him an appropriate remedy." *Id.* at 1207.

The process of declaring a child a ward of the court as a necessary predicate to invasion of the parental right to custody of their children was explicitly recognized by the Supreme Court of Illinois in *Cowls v. Cowls,* 8 Ill. 435 (1846).

> While a father so conducts himself as not to violate this right [of a child to not be abused, defrauded, or neglected], the court will not, ordinarily, interfere with his parental control. If, however, by his neglect or his abuse, he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere, and take the infant under its own charge, and place it in the custody of a proper person to act as a guardian, who may be a stranger..... Infants thus taken under the charge of the court of chancery for the protection of their persons or property, are called wards of the court...." *Id* at 438.

When the court has the predicate jurisdiction over the person of the children, "no certain

> rule can be laid down for the government of the court in all cases, except that the best interests of the child must be consulted." *Id* at 445.

The Supreme Court of Massachusetts invoked the "best interest of the child" standard to guide the appointment of a guardian for the orphan of a civil war soldier whose wife had predeceased him. *Wardell v. Wardell*, 91 Mass. 518 (1865). Accordingly, *Biggs v. Harris*, 64 N.C. 413 (1870). Obviously, the Massachusetts case was decided just prior to the ratification of the 14th Amendment in 1868, and the North Carolina case immediately afterwards.

A father who had once abandoned his child petitioned a Pennsylvania court to reinstate his rights over the rights of the child's mother who had long cared for the child. The Supreme Court of Pennsylvania confirmed custody in the child's mother upon the theory that the father had abandoned his legal preference for custody. "Having been guilty of a violation of parental duty by his desertion and voluntary neglect of maintenance as proved by the record, he cannot stand on his mere legal rights as a father, but must satisfy the judge to whom he applies for restoration, that his application proceeds from proper motives and is for the best interests of the child." *Demot v. Commonwealth of Pennsylvania*, 64 Pa. 302 , 305 (1870).

A similar reasoning was announced just eight years after the adoption of the 14th Amendment by the Supreme Court of Illinois which directly held that the natural rights of the father to custody of his children become subject to a court's discretionary power "whenever a father becomes subject to the jurisdiction of the court, in a proceeding for a divorce." *Hewitt v. Long*, 76 Ill. 399 (1875).

Thus, there is an unbroken line of this historical understanding both before and immediately after the adoption of the 14th Amendment. A parent's right to the custody of his child could not be invaded by a court until there was proof of some circumstance which made the child a ward of the court or placed the parent under the jurisdiction of the court. If a parent died leaving an indigent child or divorced, or abandoned, neglected, or abused his or her child, then the child became a ward of the court. Then and only then could a court make orders that were designed to protect the best interest of the child.

II.

THE DECISIONS OF THIS COURT HAVE IDENTIFIED AND EMBRACED THE VIEW THAT THE "BEST INTERESTS OF THE CHILD" STANDARD CANNOT BE IMPOSED ON PARENTS ABSENT A SHOWING OF FAILURE

This Court has not previously determined whether the state may interfere with parental custodial rights on the sole basis of the best interest of the child.[8] Nonetheless, this Court has frequently embraced the essential aspects of the position that we advance in this case—that parental choices

[8] Such a law was before the Court in *Caban v. Mohammed*, 441 U.S. 380 (1979). A New York law gave an unwed mother an absolute right to block an adoption of her child absent a showing of parental unfitness. However, an unwed father could not block an adoption unless he could show that it would not be in the best interest of the child. There was no requirement for showing that he was unfit as a predicate to invoking the best interest standard. This Court ruled the statute unconstitutional on the basis of gender discrimination under the Equal Protection Clause and expressly reserved ruling on the due process issues advanced in this brief. See, 441 U.S., at 394, fn. 16.

may not be reviewed by the government to determine a child's best interest absent a prior finding that the parent is at fault or has defaulted in some manner. This was stated most clearly in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978):

> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (STEWART, J., concurring in judgment).

In *Reno v. Flores*, 507 U.S. 292, 304 (1993), this Court said:

> "[T]he best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

In other words, until there has been finding that a parent has failed to provide "certain minimum requirements of child care" the government is precluded from substituting its view of what is best for a child.

This Court explicitly noted the proper use of the "best interest of the child" standard as a *dispositional* rule which only follows a fact-finding determination of fault:

At the fact-finding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act § 631 (judge shall make his order "solely on the basis of the best interests of the child, "and thus has no obligation to consider the natural parents' rights in electing dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the fact-finding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

Santosky v. Kramer, 455 U.S. 745, 760-761 (1982). See also, *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[A]bsent a finding of neglect or abuse. . . the traditional presumption that the parents act in the best interests of their child should apply.")

The danger of allowing judges to review parental decisions solely on the best interests of the child standard was strongly voiced in *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 835 (1977): "Moreover, judges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." While there is greater tolerance for vagueness with respect to dispositional matters which inherently involve judicial discretion, use of this term as the sole adjudicatory criteria is deeply troublesome to the values of the Due Process Clause.

In the context of our advocacy for the original intent of the Constitution, this review of this Court's decisions is not made for the purpose of demonstrating that this Court's precedents control the outcome of this litigation—although this is clearly the normally applicable rule. Rather, we raise these precedents in this brief to demonstrate the deep roots of the principles of procedural due process that are at issue. If this Court's precedents are out of line with the original intent, we contend that the original intent should nonetheless prevail. However, in this case there is no dissonance between original intent and this Court's precedents. The original intent of the 14th Amendment Due Process Clause, which has been demonstrated by the case law contemporaneous with its adoption, reflects exactly the same principles as this Court's current modern precedents.

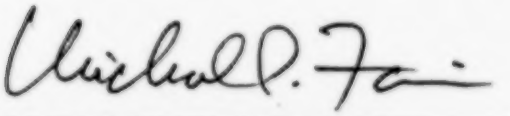
CONCLUSION

The Washington law in question gives all persons the right to petition for visitation rights with any child. No showing of parental unfitness is required. If a petition is filed, the law skips straight to the dispositional phase. The trial court is directed by the law to employ its own discretionary views over this visitation request.

Skipping to the dispositional phase without a prior showing of parental fault or unfitness violates the time-honored principles of *procedural* due process which were intended to be protected by the drafters of the 14th Amendment.

The decision below should be affirmed.

Respectfully Submitted,



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